

PATENT  
Attorney Docket No. 101.0044-03000  
Customer No. 22882

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: ) Confirmation No.: 7688  
Gary Karlin Michelson )  
Serial No.: 09/497,590 ) Group Art Unit: 3764  
Filed: June 6, 2000 ) Examiner: Michael Brown  
For: APPARATUS INCLUDING A GUARD )  
MEMBER HAVING A PASSAGE )  
WITH A NON-CIRCULAR CROSS )  
SECTION FOR PROVIDING )  
PROTECTED ACCESS TO THE )  
SPINE (as amended) )

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Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

**PETITION UNDER 37 C.F.R. § 1.144**

Under the provisions of 37 C.F.R. § 1.144, Applicant hereby respectfully petitions the Commissioner to instruct the Examiner to designate independent claim 149 (Group II of the Restriction Requirement dated August 24, 2005 (the "August Restriction") as being a generic claim to independent claim 105 (Group I of the August Restriction). The requisite petition fee of \$130.00 as specified by 37 C.F.R. § 1.17(h) is to be charged to Deposit Account No. 50-3726.

Independent claim 149 is drawn to an apparatus including a guard having a passage with "a non-circular cross section along at least a portion of the mid-longitudinal axis." Independent claim 105 is drawn to an apparatus including a guard having a passage, "the width of said passage being greater than the height of said passage along at least a portion of said passage."

In reply to the Restriction Requirement dated August 24, 2005, Applicant provisionally elected Group II, claims 149-187. In addition, Applicant respectfully traversed the Examiner's contention that "[c]urrently, no claims are generic." (August Restriction, page 2, paragraph 2). Applicant respectfully submits that independent claim 149 is generic to both Group I and Group II because the passage of the guard member having a width that is greater than its height (Group I) is a species of the genus

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represented by the passage of the guard member having a non-circular cross section (Group II).

In the Office Action dated December 1, 2005, the Examiner contended that Applicant's arguments were not persuasive because "the passage could have a width that is greater than its height but that doesn't necessary mean that the passage is non-circular." (Office Action dated December 1, 2005, page 2, paragraph 1). Applicant respectfully submits that the Examiner's contention is erroneous. If an object has a cross section with a width greater than a height, then it is impossible for that cross section to be circular. Applicant further submits that a cross section having a width greater than a height is an example of a non-circular cross section. Therefore, Applicant respectfully submits that independent claim 149, which recites the passage as having a non-circular cross section, is generic to a passage having a portion with a width that is greater than its height.

In view of the foregoing, Applicant respectfully requests that independent claim 149 (Group II) be designated as a generic claim to independent claim 105 (Group I), and that upon the allowance of claim 149, claims 105-115 and 121-148 will be rejoined and examined pursuant to 37 C.F.R. § 1.141.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,  
MARTIN & FERRARO, LLP

Dated: March 31, 2006

By:   
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